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September 30, 2021

VIA ELECTRONIC AND FIRST CLASS MAIL

Senator Sean M. Bennett
Chairman, Senate Ethics Committee
205 Gressette Bldg.
Columbia 29201

Senator George E. "Chip" Campsen, III
Chairman, Senate Fish, Game and Forestry Committee
305 Gressette Bldg.
Columbia 29201

Senator Hugh K. Leatherman, Sr.
Chairman, Senate Finance Committee
111 Gressette Bldg.
Columbia 29201

Senator Brad Hutto
Senate Minority Leader
510 Gressette Bldg.
Columbia 29201

Senator Tom Young, Jr.
608 Gressette Bldg.
Columbia 29201

Senator Greg Hembree
Chairman, Senate Education Committee
402 Gressette Bldg.
Columbia 29201

Senator Mia S. McLeod
613 Gressette Bldg.
Columbia 29201

Senator Luke A. Rankin
Chairman, Senate Judiciary Committee
101 Gressette Bldg.
Columbia 29201

Senator Billy Garrett
504 Gressette Bldg.
Columbia, SC 29201

Sponsors: Senators Bennett, Leatherman, Hembree and Rankin
Judiciary Subcommittee: Campsen (ch), Hutto, Young, McLeod, Garrett

Re: SB 174's Unconstitutional Violation of First Amendment Rights

Dear Senators,

This Firm represents the National Foundation for Gun Rights. It has come to our attention that the South Carolina Senate is considering Senate Bill 174 (S 174), which would flagrantly violate the constitutional rights of those who dare to speak to the public

and associate with each other regarding their country's and South Carolina's pressing political challenges. We urge the Senate to reject this bill, which defies Supreme Court precedent rejecting unnecessary, invasive, vague, overbroad, and burdensome political disclosure requirements that unlawfully chill First Amendment freedoms of speech and association.

Specifically, S 174 is a multi-pronged assault on South Carolinians' constitutional rights and must be rejected. The proposed measures are unnecessarily invasive, vague, and overbroad, making an incomprehensible hash of well-established and important constitutional distinctions governing laws regulating political activity—while adding little to the extensive disclosures already required. Further, the cost of compliance with SB 174's invasive, vague, overbroad and confusing rules, or fear of punishment for violating them, will discourage vital and protected political speech and association.

This burden will fall most heavily on Americans who don't have the means to hire qualified lawyers, or even know to hire a lawyer, for having the audacity to address or join their fellow citizens for a common cause. Finally, S 174 would provide a pretext for partisan or bureaucratically meaningless investigations and punishment of South Carolinians' political activity. And it would needlessly expose members of the public to politically-motivated personal attacks for their perceived beliefs.

Should the state enact such an ordinance, we are prepared to litigate to protect the First Amendment rights of the citizens of South Carolina.

The Essential Constitutional Rights of Free Speech and Association

The rights to free speech and association are at the core of American freedoms—essential rights to maintain and defend every other right we enjoy. "The First Amendment prohibits government from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Americans for Prosperity v. Bonta*, 592 U.S. ____, Slip Op. at 6 (2021) (holding a state requirement for nonprofits operating in California to disclose donors of more than $5,000 unconstitutionally infringed on the freedom of association); U.S. Const. amen. I. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others." *Americans for Prosperity at 6* (citing *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984)).

The freedom of association "furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. *Id*. (quotations omitted). "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a

restraint on freedom of association as [other] forms of governmental action." *Id*. (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958). As the Supreme Court explained, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations," *Id.* at 7 (internal citations omitted).

These rights are as critical as ever in today's starkly divided and toxic political culture, where ordinary Americans as well as professional politicians across the political spectrum are being assaulted, canceled, fired, harassed, and ostracized for any perceived deviation from the puritanical political orthodoxies of one hostile group or another.

The Bills Are Unnecessary, Vague, Overbroad, and Confusing

The assessment of the constitutionality of a disclosure requirement's burden on the First Amendment "should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Bonta* at 11. S 174's disclosure regime imposes unnecessary burdens on citizens and groups that engage in a broad range of public political advocacy that is unrelated to elections and therefore fails this test. The new statue will not prevent corruption, inform voters, or serve the citizens of South Carolina by expansively regulating, as it proposes, any communication that mentions an elected official—but it will suppress legitimate political speech and dissent.

S. 174 defines an "elections communication" to include, in addition to a communication actually intended to influence an election, four forms of communication that "support or oppose a clearly identified candidate or ballot measure." Those forms of communication include not only an ad "broadcast over radio, television, cable, or satellite," but also internet ads, newspaper ads, ads in a periodical, or a billboard, in addition to a mailing or other printed materials. The reach of S. 174 thus would go far beyond the broadcast ads that have been deemed to warrant government regulation as "electioneering communications" under federal election law.

More importantly, the "support or oppose" standard is so vague and subjective as to be useless. On the federal level, the whole point of Congress enacting a statute regulating electioneering communications was to enable the government to avoid the subjective task of having to parse the meaning of a political ad. It did this by only requiring, as far as an ad's content is concerned, that the ad identify a candidate—so long as it was also broadcast on TV, radio, or satellite shortly before an election and targeted to the electorate voting on that candidate.

The "support or oppose" standard necessarily will be applied to mean that any communication criticizing an elected official on the issues or their conduct in office is subject to regulation, and its sponsor required to register and disclose their finances. This dissent-suppressing scheme is an outrageous intrusion into South Carolinians' First Amendment rights.

By injecting a "support or oppose" content standard, the Assembly would once again drag the state's ethics agencies, the courts, and the public into the quagmire of divining the intent or effect of political speech. This will either unconstitutionally deviate from the vital "express advocacy" standard that the Supreme Court established in *Buckley v. Valeo*, 424 U.S. 1 (1974), to limit the reach of independent (from candidates) political speech regulation to communications clearly intended to influence elections. Alternatively, it would create a new rule that is so unconstitutionally vague that it would be practically impossible to apply and necessarily lead to arbitrary enforcement. S. 174 also omits the other key limiting factors found in federal election law, such as focusing on ads broadcast shortly before an election and targeting the candidate's electorate. This omission eliminates any pretense that the law is actually aimed at electioneering. In sum, even the most inconsequential communications about any issue, if they mention an elected officeholder, could subject the authoring person or group to burdensome and intrusive regulation.

S. 174 would not only have the government regulate a broad swath of speech not clearly intended to influence elections, it would deem the speakers (whether a group or an individual) to be a political committee required to disclose their finances, including contributors, to the government and the public. This massive expansion of comprehensive registration and disclosure requirements to independent persons and groups not clearly advocating to influence elections would further render S. 174 unconstitutional. Registration required if a person or group spent as little as $500, a paltry sum compared to the costs of compliance and also the amounts spent on state elections.

S. 174 thus unconstitutionally obliterates the key legal distinctions between independent expenditures and electioneering communications, and between independent speech that can permissibly be deemed to influence elections (because it contains express advocacy) from other speech which may be more ambiguous or focus on non-election issues and therefore cannot be regulated like an election-influencing expenditure.

We note that South Carolina already regulates, as independent expenditures, any "expenditure made directly or indirectly by a person to advocate the election or defeat of a clearly identified candidate or ballot measure[,]" a definition that is further limited by Supreme Court precedent, on vagueness concerns, to communications that expressly advocate for the election or defeat of a candidate or ballot measure, as well as communications that "when taken as a whole and in context, . . .[are made] to influence the outcome of an elective office or ballot measure[.]" South Carolina Code § 8-13-1300(17).

In sum, S. 174 is not only unconstitutionally vague and burdensome, it adds nothing significant to South Carolina's effort to provide voters with ample disclosure about communications that are clearly intended to influence elections.

The Burden of Compliance with SB 174 And Fear of Investigation or Punishment Will Chill Political Speech

The cost of compliance with SB 174's invasive, vague, and overbroad rules, or fear of punishment for violating them, will discourage vital and protected political speech and association. Compelled donor disclosure for plain speech criticizing elected politicians on the issues will strangle civic engagement, cutting off the resources needed for effective public advocacy. With expert counsel costing hundreds of dollars an hour, political treasurers costing at least hundreds of dollars per month, and the defense of government investigations or litigation costing tens of thousands of dollars, the crushing burden of this futile, complex, and unnecessary new law would illegally smother South Carolinian's political speech and association.

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Enactment of SB 174 would trample South Carolinians' right to political speech and association free from government intrusion, discouraging political discourse and dissent with the threat of investigation and punishment, and costly bureaucratic requirements. The proposed disclosure scheme would threaten to expose ordinary citizens to attacks for their perceived political beliefs on sensitive issues. If SB 174 is enacted, we have been authorized to file a lawsuit pursuant to 42 U.S.C. §1983 for the deprivation of constitutional rights. Once we prevail in protecting those rights, we will seek our reasonable attorney fees under 42 U.S.C. §1988(b). We thereby strongly encourage you to reconsider moving forward with the proposed legislation.

Regards,

David A. Warrington
Counsel for the National Foundation for Gun Rights

Cc: National Foundation for Gun Rights